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In the Supreme Court of the United States

October Term, 1980

GULF STATES CANNERS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Fifth Circuit, that the Board did not err in finding that a union's preelection conferral of economic benefits upon employees did not have an objectionable tendency to influence their vote in a representation election, is contrary to this Court's decision in *NLRB v. Savair Manufacturing Company*, 414 U.S. 270 (1973).

2. Whether the decision of the Fifth Circuit conflicts with the decision of other courts of appeals on the same issue, thereby necessitating this Court's grant of certiorari to resolve that conflict.

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GULF STATES CANNERS, INC.,
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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Gulf States Canners, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 12, 1981.

OPINIONS BELOW

The Report on Objections issued by the Regional Director of the National Labor Relations Board's Fifteenth Region is unreported. Therein, the Regional Director dismissed the Petitioner's objections to the representation election of December 9, 1976. That part of his Report on Objections discussing Petitioner's Objection IV (pre-election purchases of gasoline for employees) is reprinted in Appendix A.

The unreported Decision and Certification of Representative rendered by the National Labor Relations Board (hereinafter referred to as the "Board") is reprinted in Appendix B. In its decision, the Board adopted the Regional Director's Report on Objections and certified the International Brotherhood of Teamsters, Local Union No. 891, as the collective bargaining representative of Petitioner's production, maintenance and quality control employees.

The Board's Decision and Order in this proceeding, reported at 232 NLRB No. 79, found that the Petitioner had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, by refusing to bargain with the International Brotherhood of Teamsters, Local Union No. 891, as its employees' collective bargaining representative, and ordered the Petitioner to bargain with that labor organization.

The decision of the United States Court of Appeals for the Fifth Circuit which denied enforcement of the Board's bargaining order and remanded the proceeding to the Board for further consideration of Petitioner's Objection IV is reported at 585 F.2d 757. It is reprinted in Appendix C.

The Board's Supplemental Decision and Order is reported at 242 NLRB No. 190 and is reprinted in Appendix D. In the decision on remand, the Board reaffirmed its dismissal of Petitioner's Objection IV and its previous bargaining order.

The decision of the United States Court of Appeals for the Fifth Circuit which granted enforcement of the Board's bargaining order is reported at 634 F.2d 215. It is reprinted in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit enforcing the Board's bargaining order was entered on January 12, 1981. (See Appendix E.) A timely petition for rehearing or rehearing en banc was denied on March 4, 1981, and is reprinted in Appendix F. This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), reads as follows:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to provisions of section 9(a).

STATEMENT OF THE CASE

A. Representation Proceedings

On December 9, 1976, the International Brotherhood of Teamsters, Local Union No. 891 (hereinafter the "Union"), was selected, by a vote of 20 to 16, as the collective bargaining representative of Petitioner's production, maintenance and quality control employees. The Petitioner timely filed objections to conduct by the Union affecting the results of that election. An investigation of Petitioner's Objection IV revealed that Union representatives had purchased gasoline for two employees during the preelection period. In addition to recommending that Petitioner's other objections be overruled, the Regional

Director of the Board's Fifteenth Region, finding that the Union did not intend to influence the employees' votes by means of the gasoline purchases, also recommended that Petitioner's Objection IV be overruled. (See Appendix A.) The Board *pro forma* adopted the Regional Director's findings and recommendations and certified the Union as the employees' collective bargaining representative. (See Appendix B.)

B. Unfair Labor Practice Proceedings

Following the issuance of the certification, Petitioner refused to bargain with the Union. On September 29, 1977, the Board found that Petitioner had violated Section 8(a)(5) of the Act by refusing to bargain with the Union as the collective bargaining representative of its employees. In addition, it ordered the Petitioner to bargain with the Union. *Gulf States Canners, Inc.*, 232 NLRB No. 79 (1977).

C. Initial Enforcement Proceeding

After Petitioner refused to comply, the Board sought enforcement of its bargaining order in the United States Court of Appeals for the Fifth Circuit (hereinafter the "Fifth Circuit"). On December 7, 1978, a three-judge panel, based on its conclusion that the Board had utilized an improper test in determining whether the Union's pre-election purchases of gasoline for two employees should cause the representation election to be set aside, denied enforcement of that order. Instead, the panel found that the proper test was whether those purchases had a tendency to influence the employees' votes and remanded the case to the Board to allow it to make that determination. *NLRB v. Gulf States Canners, Inc.*, 585 F.2d 757 (5th Cir. 1978). (See Appendix C.)

D. Proceedings on Remand

On remand, the Board concluded that the Union's preelection purchases of gasoline for the two employees did not have a tendency to influence their votes in the representation election. As a result, the purchases did not require that the representation election be set aside. The Board therefore reaffirmed its previous bargaining order. *Gulf States Canners, Inc.*, 242 NLRB No. 190 (1980). (See Appendix D.)

E. Second Enforcement Proceedings

Following the Petitioner's refusal to comply, the Board again sought enforcement of its bargaining order in the Fifth Circuit. On January 12, 1981, a three-judge panel ruled that the Board did not abuse its discretion by finding that the Union's preelection purchases of gasoline did not have a tendency to influence the two employees' votes. Accordingly, the Court, finding that the Board did not err in refusing to set aside the representation election, granted enforcement of the Board's bargaining order. *NLRB v. Gulf States Canners, Inc.*, 634 F.2d 215 (5th Cir. 1981). (See Appendix E.)

F. Facts

1. Initial Purchase of Gasoline for Employee D

Following the Union's first meeting, which occurred a month before the election, Employee D asked a Union representative if he was buying gasoline for the employees. The Union representative told Employee D that if he knew of anyone who wanted to come to the Union's meetings but didn't have transportation, the Union would furnish gasoline to provide transportation for that person. The Union representative then asked Employee D if he wanted some

gasoline. Employee D said that he did. He then drove his car to a gasoline station where the Union representative purchased twelve dollars worth of gasoline for him. It was not shown that Employee D ever transported other employees to Union meetings or used the gasoline in campaigning on the Union's behalf at his fellow employees' homes. (See Appendix A.)

Based on these circumstances, it must be concluded that the Union's initial purchase of gasoline for Employee D was an outright gift.

2. Second Purchase of Gasoline for Employee D

According to a Union representative, on December 5, 1976, four days before the representation election, the Union again purchased twelve dollars worth of gasoline for Employee D. According to this Union representative, the gasoline was purchased to allow Employee D and his brother, who had both stopped by a Union meeting after being released from jail, to return to their homes. No one said anything about using this gasoline in transporting other employees to Union meetings or in campaigning on the Union's behalf. Absolutely no stipulation whatsoever was placed on Employee D's use of the gasoline. (See Appendix A.) In such a context and under such circumstances, Employee D and his brother could only have regarded the gasoline as an outright gift.

3. Purchase of Gasoline for Employee C

On one of the occasions gasoline was purchased for Employee D, seven dollars worth of gasoline was also purchased for Employee C. In his affidavit, Employee C stated that he had no idea as to why the Union representative purchased gasoline for him. The Union representative

simply offered to buy him some gasoline, and he accepted that offer.[1] (See Appendix A.)

In such circumstances, it must also be concluded, as was the case with the Union's purchase of gasoline for Employee D, that Employee C could have only regarded the gasoline as an outright gift.

WHY THE PETITION SHOULD BE GRANTED

The Fifth Circuit's decision, that the Union's pre-election purchases of gasoline for two employees did not constitute objectionable conduct requiring the results of the representation election to be set aside, is squarely in conflict with the decision of this Court in *NLRB v. Savair Manufacturing Company*, 414 U.S. 270 (1973). In addition, there is a direct conflict between the Fifth Circuit's decision on this issue and decisions rendered by the United States Courts of Appeals for the Fourth and Sixth Circuits (hereinafter referred to as the "Fourth Circuit" and "Sixth Circuit"). Therefore, because of either of these reasons, this Court should grant certiorari herein.

In *NLRB v. Savair Manufacturing Company*, 414 U.S. 270 (1973), this Court decided that a union's offer to waive a $10 initiation fee for all employees who sign union authorization cards before a Board representation election, if permitted, would allow the Union to buy endorsements and influence the outcome of the election. In proscribing

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1. In footnote 7 to its decision, the Board noted that another employee who submitted an affidavit during the objections investigation, stated that Employee C told him that he was given the gasoline so that he could attend a Union meeting. However, the Board failed to make a finding that Employee C was being untruthful when he said he did not know why he was being given the gasoline. In addition, the Union representative who purchased the gasoline for Employee C did not give an affidavit regarding its purchase. (See Appendix A & Appendix D.)

such conduct, the Court relied on several Board and Courts of Appeal cases which held that the granting of an unreasonable or excessive inducement by a union potentially influenced employees and constituted grounds for setting aside an election.[2]

The inducement proscribed in *Savair* was a contingent one. The Union had to win the election before an employee received the benefit in the form of a waiver of the initiation fee. Although disagreeing with the majority view, Justice White in his dissent, pointed out that direct cash payments by the Union presents a different situation. Relying on *Wagner Electric Corp.*, 167 NLRB 532 (1967); *Collins & Aikman Corp. v. NLRB*, 383 F.2d 722 (4th Cir. 1967); and *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109 (8th Cir. 1972), he stated:

> It is certainly arguable that such a connection [between a Union inducement and the employee's vote] can be made when the union pays a person cash to vote for or assist the Union. The benefit of the union has been tendered and the employee may well feel he has incurred a moral obligation to vote for the union.[3]

Both the Fourth and the Sixth Circuits have overturned Board decisions where direct gifts or excessive reimbursements have been bestowed on the employees, finding that such conduct by the union had a tendency to influence the election outcome.

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2. *Collins & Aikman Corp. v. NLRB*, 383 F.2d 722, 728-729 (4th Cir. 1967) (overpayment to an election observer); *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109 (8th Cir. 1972) (disproportionate payments to employees attending hearings); *General Cable Corp.*, 170 NLRB 1682 (1968) ($5 gift to employees prior to election); *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967) (grant of life insurance to employees who signed cards prior to election).

3. 414 U.S. at 279 n.6.

The case presented to the Fourth Circuit in *Collins & Aikman Corp. v. NLRB,* 383 F.2d 722 (4th Cir. 1967), involved payment by the Union of $7.00 to its election observer when his regular pay as an employee for the period of time involved was $2.00.

Plastic Masters, Inc. v. NLRB, 512 F.2d 449 (6th Cir. 1975), also involved overpayment to an election observer - less than twice his usual pay.

In *NLRB v. Madisonville Concrete Company,* 552 F.2d 168 (6th Cir. 1977), prior to the election an employee received a traffic ticket a block from the union hall. A union official took the ticket and promised to take care of it. The employee related this to the other employees. Subsequent to the election the employee's $5 fine and $31 costs were paid by the union.

In each of these cases the election results were close; the payments were either excessive reimbursements or outright gifts; and based on these facts the Courts decided that the union's conduct had a tendency to influence the election outcome.

In the instant case the election result was close.[4] It is uncontroverted that the employees actually received the gasoline. Also, there is no evidence in the record that the employees performed any service whatsoever on behalf of the Union. Under such circumstances it must be concluded that the payments were nothing more than outright gifts to the employees. Nothing distinguishes the instant case from those cited above from the Fourth and

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4. Twenty employees voted in favor of the Union, while sixteen employees voted against Union. Therefore, had two employees who voted in favor of Union representation cast their ballots against such representation, the vote would have been eighteen to eighteen. In that event, because it would not have received a majority of the valid ballots cast in the election, the Union would have lost the election.

Sixth Circuits except the final result. The Fifth Circuit simply accepted the decision of the NLRB that the payments did not have a tendency to influence the election results thereby rendering a decision which is in direct conflict with *NLRB v. Savair Manufacturing Company,* 414 U.S. 270 (1973); *Collins & Aikman Corp. v. NLRB,* 383 F.2d 722 (4th Cir. 1967); *Plastic Masters, Inc. v. NLRB,* 512 F.2d 449 (6th Cir. 1975); and *NLRB v. Madisonville Concrete Company,* 552 F.2d 168 (6th Cir. 1977).

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 15-RC-6001

GULF STATES CANNERS, INC.
Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 891
Petitioner

REPORT ON OBJECTIONS

* * *

Objection No. 4:

In support of its allegation that the Petitioner had promised free gas, free beer and/or a victory party in order to gain employee support and/or votes for the Union in the representation election, Employer presented Employee Witnesses, B, C, D, E, F, and G.

Witness D stated:

> At the first Union meeting, Rucker [Wicker] said that if anyone knew anyone who did not have transportation he would go with that person and furnish him with gas so that we could pick up people who did not have a ride and bring them to the Union hall. After the meeting I asked a Union man whose name I don't recall:

Witness D: Didn't you say you were buying gas?

Union Man: No, I am not buying gas. I said if you knew of anyone who wanted to come to the meeting but didn't have a ride I would furnish the gas to get that person. Oh, do you want some gas?

Witness D: Yes.

Union Man: Okay.

We then went to a Gulf service station and the Union man bought me a tank of gas.

The next week at the next Union meeting, I asked Rucker [Wicker] about gas. After the meeting was over[:]

Witness D: I need some gas.
Wicker: Okay, follow me.

I followed Wicker to the Gulf Station in his car and he bought me another tank of gas. I drive a 1974 Ford Fairlane and each time the Union man bought me gas it took about $12 to fill the tank.

In this regard Witness B explained:

I think at the first Union meeting I attended, the Union man, Wicker, said that if any of the people at the meeting needed gas to go around and talk to other employees about the union, that he would buy the gas. After the meeting was over [Witness D], another employee at the Company, told Wicker that his car was empty and that he needed some gas. Wicker told [Witness D] to follow him up to the service station on the corner of Ellis Avenue and highway 80 in Jackson, MS. Witness D followed Wicker

in his car to the gas station. I rode with [Witness D]. When we got to the gas station, [Witness D] got his car filled with gas and Wicker paid for it with a credit card. I do not recall how much the gas cost.

During the second Union meeting, the Saturday following the first meeting, [Witness D] told another Union man, who later had a heart attack, that his car was empty and he needed some gas. The Union man told [Witness D] to meet him at the service station after the meeting was over. After the meeting was over [Witness D] and I rode in his car to the service station. [Witness C], another employee at the company. trailed us to the station. When we got to the station, the Union guy was already there. The Union man told the man at the station to fill up [Witness D's] and [Witness C's] cars. After the man had filled their cars with gas the Union guy paid for the gas for both cars with a credit card. [Witness D] had a locking top on his gas tank and he did not have the key with him. [Witness D] said that he was going to tear the top off the tank. The Union guy told him to buy another top for the tank and to bring him the receipt and he (the Union man) would pay for it.

Witness C related the following:

At one of the above union meetings held about 1 month before the election, Buddy Stapleton, a union representative for the Teamsters offered to and did later buy gas for myself and [Witness D] after this meeting. No reason was ever given by Stapleton or any other union representative for the buying of gas for myself and [Witness D]. After the meeting [Witness D] and myself drove out to a Gulf Station in

Jackson, Miss. and Stapleton let us fill our cars up with gas and paid for it himself with a credit card. My gas bill was about $6.88 and [Witness D's] bill was between $12 and $15.

Witness E stated:

Two employees by the names [of] [Witness C] and [Witness D] told me that on[e] of the union (Local 891) officials filled their car with gas on one occasion. . . . I don't know who the union official was or any circumstances about the buying of any gas by this official.

Witness F explained as follows:

I have never received anything at all from the Union. [Witness D], another employee at the company, told another employee at the company that the Union man had given him gasoline for free. I heard him say this in the breakroom sometime before the election. I do not recall how long before the election this occurred.

Finally, Witness G stated:

[Witness C], an employee (machine operator), told me he was given gas on one occasion by the union so that he could attend a union meeting. This is all that I know in regard to [this].

As to the Union's response to this allegation, M. E. Wicker, Business Representative of Teamsters Local 891, who was present at the first Union meeting on October 24, 1976, related the following statement by Union Representative Stapleton:

If any of you would like to go with us or go to the homes of other employees in the warehouse and talk to them about coming to Union meetings we will furnish the gas.

Wicker further stated that after the October 24, 1976, union meeting Stapleton and some other employees left to get beer for the employees. Upon their return Wicker saw that Stapleton's hand was scratched and related the following:

> Stapleton: Boy, I tore my hand up over there on one of those guy's gas caps.
>
> I don't recall which employee's car had the gas cap. . . . Stapleton didn't give any account of any specifics of buying gas.

Additionally, Wicker stated that at the last union meeting, December 5, 1976, he was approached by Witness D and that the following occurred:

> Witness D: My brother and myself just got out of jail today. We came right from jail here. Can you get some gas so I can go home?
>
> Wicker: Yes.
>
> Wicker: Let's go.
>
> We went to get in his car. We went to the Premier Station on Raymond Road. I filled up the gas tank. We then went back to the Union hall. I only filled 1 car [sic] gas tank [Witness D's]. . . . When we went to get gas it was just [Witness D] and myself. . . . This is the only instance of me giving gas to an employee. I gave it to [Witness D] because he said he needed it to get home. I didn't put any stipulations on receipt of the gas nor did I ask him to vote for the Union. I don't know how [Witness D] voted or if he voted in the election in 15-RC-6001.
>
> . . . I never filled [Witness C's] car with gas. . . . I never gave any special favors to any employees to get them to support the union in the representation election.

In support of the Employer's allegation that the Petitioner promised free beer to employees and a victory celebration if the Union won. Employer presented Employee Witnesses C, D, F, and L.

Witness C stated:

> After two of the union meetings, one of which was after Stapleton bought gas for us, the union provided beer for all those who wanted it. No reason was ever [given] for the union providing this beer by any union representative.

Witness D related:

> At the last Union meeting the Union man bought twenty one dollars and twenty five cents worth of beer and gave it to the employees. I know how much the beer costs because I went to pick it up.
>
> At the second Union meeting, Rucker [Wicker] told the employees present that if the Union won the election they (the Union) would have a party for employees.

Witness F explained:

> I have heard employees at the company say that they had gone to Union meetings and had beer and champale that was given to them by the union men. I do not recall any specific incidents when I heard these things but they were said in conversations between employees in the breakroom.

Finally, Witness L related the following:

> I have no knowledge of any union officers, agents or representatives giving special favors to employees to get them to support the union.
>
> After the meeting in the last part of November that I attended, some [one] said:

Someone: We should have some beer to drink.

Wicker: Well, the next meeting we'll have some beer after the meeting.

. . . the next meeting there was beer. However, I don't know how much it was or how it was obtained.

In response to the Employer's allegation in this regard, Petitioner representative Wicker stated:

> The only time I bought beer for employees who wanted it was at the last Union meeting on December 5, 1976. I sent driver ..... to buy beer. I asked for and received a cash ticket of about $21.00, $23.00 or $25.00 for the cost of this beer. I never put any conditions on buying beer for employees. I never conditioned the buying of beer for employees on voting for the union. I never heard Stapleton condition the buying of beer on voting for the Union.
>
> I never gave any special favors to any employees to get them to support the union in the representation election. I don't know any Union officer, agent or representative who gave any special favors to employees to get them to vote for the Union in 15-RC-6001.

Based on the foregoing, the undersigned concludes that the Petitioner's furnishing of beer to employees at union meetings, the providing of gas to one or two employees, and the promising of a victory party did not constitute objectionable conduct. Rather, the facts presented and evidence adduced during the investigation failed to disclose that the Petitioner made any promise or granted any financial or other rewards to employees for their support and/or votes for Petitioner in the election. Employer presented no other evidence nor was any adduced during the investigation in support of this objection. Accordingly, the

undersigned concludes that Objection No. 4 is without merit and recommends that it be overruled.

* * *

CONCLUSIONS AND RECOMMENDATION

For the reasons stated above, the undersigned concludes that the Employer Objections Nos. 1 through 5 do not raise substantial or material issues affecting the conduct of the election or the results thereof, and recommends that Employer's Objections No. 1 through 5 be overruled in their entirety.

Petitioner having received a majority of the ballots cast in the election, it is further recommended that the Petitioner be duly certified.[9]

Unit: All production and maintenance employees and quality control employees employed by Employer at its Clinton, Mississippi, facility; excluding all office clerical employees, truck drivers, watchmen and/or guards and supervisors as defined in the Act.

Dated at New Orleans, Louisiana, this 4th day of February, 1977.

/s/ Charles M. Paschal, Jr.
Charles M. Paschal, Jr.
Regional Director
National Labor Relations Board
Fifteenth Region
Suite 2700 Plaza Tower Building
1001 Howard Avenue
New Orleans, Louisiana 70113

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9. Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D. C. Exceptions must be received by the Board in Washington no later than the close of business on February 17, 1977.

APPENDIX B

JPW

Clinton, Miss.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15-RC-6001

GULF STATES CANNERS, INC.
Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NO. 891
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held December 9, 1976[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief,

1. The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 20 for, and 16 against, the Petitioner; there were no challenged ballots.

and hereby adopts the Regional Director's findings[2] and recommendations.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for International Brotherhood of Teamsters Local Union No. 891 and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees and quality control employees employed by Employer at its Clinton, Mississippi, facility; excluding all office clerical employees, truck drivers, watchmen and/or guards and supervisors as defined in the Act.

Dated, Washington, D. C., April 8, 1977.

Howard Jenkins, Jr., Member
John A. Penello, Member
Peter D. Walther, Member
(Seal) National Labor Relations Board

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2. Member Penello agrees with the Regional Director that the alleged misrepresentations do not warrant setting aside the election, but so finds for the reasons set forth in his dissenting opinions in *Ereno Lewis*, 217 NLRB 239 (1975) and *Medical Ancillary Services, Inc.*, 212 NLRB 582 (1974). Member Walther agrees with the conclusion that the election should not be set aside inasmuch as the same result is reached under any view of the applicability of *Hollywood Ceramics*, 140 NLRB 221 (1962).

APPENDIX C

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

GULF STATES CANNERS, INC., Respondent.

No. 78-1162.

United States Court of Appeals,
Fifth Circuit.

Dec. 7, 1978.

On application for enforcement of an order of the National Labor Relations Board, the Court of Appeals, Charles Clark, Circuit Judge, held that: (1) whether the union in making gifts intended to influence outcome of the election was not the proper test of election results and, rather, unlawful acts would taint the election if those acts interfered with employees' exercise of free choice to such extent that they materially affected results of the election; (2) in determining whether payments by the union had a tendency to influence the election, it was required that there be examination of challenged action in light of all relevant facts, including whether size of benefit conferred bore proper relationship to the actor's stated purpose in conferring it, number of employees receiving the benefit, views of employees concerning purpose of the payments, and timing of the payments, and (3) where the Board did not apply the appropriate standard in assessing validity of the election, the Court of Appeals would not enforce the Board's order.

Enforcement denied, and cause remanded.

* * *

Before COLEMAN, CLARK, and RUBIN, Circuit Judges.

CHARLES CLARK, Circuit Judge:

On December 9, 1976, the employees of the Gulf States Canners, Inc., facility in Clinton, Mississippi, voted to determine whether the International Brotherhood of teamsters, Local No. 891, should serve as their collective bargaining representative. The Union won the election by a vote of twenty to sixteen. Gulf Canners filed timely objections to the conduct of the Union during the preelection period, but the National Labor Relations Board (the Board) rejected these arguments and certified the Union as the exclusive bargaining agents of Gulf Canners employees. The Union requested Gulf Canners to conduct contract negotiations with it, and the Company refused, claiming that the Board had erred in overruling its objections to the election. The Union then filed a complaint charging Gulf Canners with unfair labor practices as a result of this refusal. The Board, acting without a hearing, accepted the Union's arguments and ordered Gulf Canners to conduct contract negotiations with the Union. The Board has applied for enforcement of this order.

Gulf Canners initially asserted numerous instances of misconduct on the part of the Union, but has raised only one objection in this enforcement proceeding. Gulf Canners claims that certain payments the Union made to Gulf Canners' employees vitiate the election results. The record shows that, prior to the election, the Union provided approximately $24 worth of gasoline to one Gulf Canners' employee in the voting unit and $6.88 worth of gasoline to another. The Union claimed the purchases of gasoline were to compensate for fuel consumed in traveling to the Union's meetings. The Board, adopting the findings

of its regional director, held that, regardless of whether the purchases were as gifts or for reimbursement of expenses, they did not warrant setting aside the election.

[1] In reaching his determination on this issue, the regional director concluded that the election results must stand unless Gulf Canners shows that the Union, in making the gifts, intended to influence the outcome of the election. Gulf Canners argues that the regional director erred in applying this intent test. We agree.

This court has held that union elections should be conducted under laboratory conditions and that an election must be invalidated upon a finding of a substantial breach in those conditions. *NLRB v. Handy Hardware Wholesale, Inc.*, 542 F.2d 935, 938 (5th Cir. 1976), *cert. denied*, 431 U.S. 954, 97 S.Ct. 2675, 53 L.Ed.2d 271 (1977); *Home Town Foods, Inc. v. NLRB*, 416 F.2d 392, 396 (5th Cir. 1969). Unlawful acts will taint an election if those acts "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of an election." *NLRB v. Sumter Plywood Corporation*, 535 F.2d 917, 920 (5th Cir. 1976) (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)), *cert. denied*, 429 U.S. 1092, 97 S.Ct. 1105, 51 L.Ed.2d 538 (1977).

The intent test is inconsistent with the logic behind these holdings. The effects of an act intended to influence an election may be so minimal that the outcome remains unaffected. Conversely an unintentional act may have such a deleterious effect on the conduct of an election that the result does not reflect the voters' free will. In determining whether an election should be invalidated, the focus should be on the effects of a particular act on the electorate rather than on the actor's intent.

[2] We are aware that, in many instances, assessing the effect of a particular action on the electorate could be a difficult, if not impossible, task. This is because detecting the subjective reaction of employees to electioneering requires an expedition into the thought processes of the electorate, a journey that administrators and courts are ill-equipped to make. To eliminate this invitation to speculate, the Board should not attempt to plumb the subconscious. Rather, the assay should seek to find whether the questioned action by an election candidate had a tendency to influence the outcome of the voting. If the challenged action had a tendency to influence the outcome of the election, then the election should be invalidated. *NLRB v. Bristol Spring Manufacturing Co.*, 579 F.2d 704 (2nd Cir. 1978); *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449, 450-51 (6th Cir. 1975); *Collins & Aikman Corporation v. NLRB*, 383 F.2d 722, 726 (4th Cir. 1967); *see NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973).

[3] The tendency-to-influence test requires an examination of the challenged action in light of all the relevant facts, including whether the size of the benefit conferred bears a proper relationship to the actor's stated purpose in conferring it, the number of employees receiving the benefit, the views of the employees concerning the purposes of the payments, and the timing of the payments. *See NLRB v. Commercial Letter, Inc.*, 455 F.2d 109, 111-12 (8th Cir. 1972). Moreover, when, as is the case here, a change of only a few votes would affect the outcome of the election, less egregious actions may require a rerun of the election than a case in which a clear-cut choice has emerged from the balloting. *United Steelworkers of America v. NLRB*, 496 F.2d 1342, 1347 n.11 (5th Cir. 1974).

[4] Since the NLRB did not apply the appropriate standard in assessing the validity of the election, we refuse enforcement and remand the case for further consideration under the proper test set out in this opinion.[1]

ENFORCEMENT DENIED.

CAUSE REMANDED.

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1. We note that a hearing will not be necessary on remand. The facts here are undisputed, and the application of the tendency-to-influence test to these facts presents strictly a question of law. *See NLRB v. Handy Hardware Wholesale, Inc.*, 542 F.2d 935, 937 (5th Cir. 1976), *cert. denied*, 431 U.S. 954, 97 S.Ct. 2675, 53 L.Ed.2d 271 (1977).

APPENDIX D

242 NLRB No. 190

FJP
D-5190
Clinton, MS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15-CA-6497-2

GULF STATES CANNERS, INC.

and

INTERNATIONAL BROTHEROOD OF TEAMSTERS, LOCAL NO. 891

SUPPLEMENTAL DECISION AND ORDER

On September 29, 1977, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] Therein, the Board found that Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain with the Union, based on allegations of union campaign misconduct, after it was certified by the Board as the exclusive bargaining representative of Respondent's production and maintenance and quality control employees. Further, the Board ordered that Respondent cease and desist from refusing to so bargain and to take certain affirmative action, including bargaining, upon request, with said Union.

In the underlying representation proceeding, Respondent, in its objections, alleged *inter alia*, that the Union

1. 232 NLRB 601 (1977).

had engaged in campaign misconduct through its grants of economic inducements to employees for their support in the forms of free gas, beer, and a victory party. The Regional Director overruled this objection[2] and concluded that the Union's "furnishing of beer to employees at union meetings, the providing of gas to one or two employees, and the promising of a victory party did not constitute objectionable conduct. Rather, the facts presented and evidence adduced during the investigation failed to disclose that [the Union] made any promise or granted any financial or other rewards to employees for their support and/or votes for [the Union] in the election."

Thereafter, on April 8, 1977, the Board, in its Decision and Certification of Representative in Case 15-RC-6001, adopted the Regional Director's report in which he recommended finding no merit in Respondent's objections.

On December 7, 1978, pursuant to the Board's application for enforcement of its Order in the unfair labor practice case, the United States Court of Appeals for the Fifth Circuit issued its opinion denying enforcement based on its conclusion that the Regional Director had utilized an improper test in determining whether or not the Union's bestowal of economic benefits in the form of gasoline constituted objectionable conduct.[3] In the court's view, the Regional Director approached the issue by questioning whether or not the Union intended to influence the outcome of the election by purchasing the gasoline, rather than

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2. Respondent had filed five objections in this proceeding alleging campaign and election misconduct, all of which were found by the Regional Director to be without merit. Respondent raised only its objection to the Union's gift of gas to two of the eligible voters in denying the validity of the Union's certification in the enforcement proceeding.

3. *N.L.R.B. v. Gulf States Canners, Inc.*, 585 F.2d 757 (5th Cir. 1978).

using the appropriate standard of whether the Union's conduct had a tendency to influence the outcome of the election. Therefore, the court remanded the case to the Board for consideration under the above proper standard noting that a hearing was not necessary in order to make this determination as "the facts here are undisputed and the application of the tendency-to-influence test to these facts presents strictly a question of law.[4] Further, to assist the Board in its analysis of whether or not the Union's purchase of gasoline tended to influence the election, the court listed some factors for it to consider including "whether the size of the benefit conferred bears a proper relationship to the actor's stated purpose in conferring it, the number of employees receiving the benefit, the views of the employees concerning the purposes of the payments, and the timing of the payments."[5]

Thereafter, the Board accepted the remand and by letter dated January 29, 1979, invited the parties to submit statements of position with respect to the issues raised by the court's remand. Subsequently, Respondent filed such a statement.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The facts regarding Respondent's allegations of union interference with the outcome of the election by purchasing gas for two employees[6] are as follows: At the first union

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4. *Id.* at 760, fn. 1.

5. *Id.* at 759.

6. The 2 employees for whom the Union purchased gasoline were among the 36 eligible voters in the unit. The tally in the election was 20 for, and 16 against, the Union, with no challenged ballots.

meeting, more than 1 month prior to the election, the Union announced its offer to provide gasoline to employees who transported other workers to the union meetings and/or who campaigned on behalf of the Union at their fellow employees' homes. After this meeting, one employee, designated as Witness D in the Regional Director's report, requested gasoline from a union representative. According to Witness D's account of this conversation, he asked, "Didn't you say you were buying gas?" to which the union representative replied, "No, I am not buying gas. I said if you knew of anyone who wanted to come to the meeting but didn't have a ride I would furnish the gas to get that person. Oh, do you want some gas?" Witness D, at that point, answered, "Yes," and the union representative said, "Okay." The union representative then purchased approximately 12 dollars' worth of gasoline for Witness D. A week later, after the second union meeting, Witness D approached the union representative and, as set forth in his affidavit, stated, "I need some gas," to which the union representative replied, "Okay, follow me." (At that time, the union representative again purchased approximately the same amount of gasoline for Witness D). On this occasion, another employee, Witness C, who had followed Witness D and the union representative to the gas station, received approximately 7 dollars' worth of fuel.[7]

The question now before the Board is whether or not the application of the tendency-to-influence test to

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7. During the investigation of the instant case, Witness C stated that he was unaware of the reason the gas was furnished. A third employee, however, claimed that Witness C told him that he was given gas so that he could attend a union meeting. In addition, the investigation also disclosed that, although the union representative denied that he had purchased gas for this employee, at least three additional employees knew of the free gas incidents involving both Witnesses C and D.

the Union's action in purchasing gasoline for two employees during its organizational campaign, 1 month prior to the election, requires finding that the Union's action constitutes objectionable conduct and, therefore, that the election be set aside.

In evaluating whether or not certain campaign tactics constitute objectionable conduct, the Board has generally applied an objective standard in accord with the "tendency-to-influence test" followed by the courts,[8] and with that which we have been directed to apply herein. For example, in *Hollywood Plastics, Inc.*,[9] the Board stated that in determining the legality of an election day raffle it would consider whether the value of the economic benefit given would "reasonably tend to have the effect that they [the employees] would feel an obligation to vote against the union, or otherwise impair their exercise of a free choice."[10] Applying this test in *Hollywood Plastics,* the Board adopted the Regional Director's finding that an employer-conducted raffle with a prize value of $80 was not unlawful, even though it was held for the purpose of electioneering propaganda, as the chance of an employee winning was 1 out of 95, which would not create the aforesaid sense of obligation. The Board has also engaged in similar objective analysis in deciding, *inter alia,* the legality of (1) cash prizes to 4 winners of an employer-sponsored contest in a 13-man unit;[11] (2) payments to employees as a result of competitive bidding between rival

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8. See, e.g., *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973); *Plastic Masters, Inc. v. N.L.R.B.*, 512 F.2d 449, 450 (6th Cir. 1975); *Collins & Aikman Corporation v. N.L.R.B.*, 383 F.2d 722, 727-729 (4th Cir. 1967).

9. 177 NLRB 678 (1969).

10. *Id.* at 681.

11. *Thrift Drug Company,* 217 NLRB 1094 (1975) (Member Jenkins dissenting) (not objectionable conduct as no feeling of obligation created).

unions for the employees' attendance at their respective union meetings;[12] (3) an employer's gift of a free steak dinner with eligibility for door prizes, plus 3 hours' pay to eligible employees;[13] and (4) a union's gift of life insurance coverage to prospective voters.[14] Further, it is clear from Board and court precedent that the mere fact that a payment in cash or in kind has been made to an eligible voter during a pre-election campaign does not require a *per se* finding that the employees' right to make a free and uncoerced choice of a bargaining representative has been destroyed.[15] Whether or not the Union's free gas policy herein resulted in a concomitant abrogation of this right must be determined from an application of the tendency-to-influence test to the facts in the instant case, taking into account the factors cited by the court set out above.

There is no dispute that the Union publicly announced more than 1 month prior to the election the purposes to which the free gas it provided was to be used. There is also no evidence that the gas was not in fact utilized

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12. *Teletype Corporation,* 122 NLRB 1594, 1595 (1959) ("[T]he payments of moneys [were] so excessive that we cannot assume the election truly reflected the employees' choice.").

13. *Winn-Dixie Stores, Inc.,* 224 NLRB 1418, 1430 (1976) ("[T]he dinner meeting was conducted under circumstances which would tend to inspire uncommitted employees to sense an obligation to support management's position in the election.").

14. *Wagner Electric Corporation, Chatham Division,* 167 NLRB 532, 533 (1967) ("[The gift] subjects the donees to a constraint to vote for the donor union," and "destroyed the atmosphere which the Board seeks to preserve for its elections in order that employees may exercise freedom of choice on representation questions.").

15. See, e.g., *Collins & Aikman v. N.L.R.B., supra* at 729; *Thrift Drug Co., supra; Commercial Letter, Inc.,* 200 NLRB 534, 542 on remand from 455 F.2d 109 (8th Cir. 1972), enfd. 496 F.2d 35 (8th Cir. 1974); *Jacqueline Cochran, Inc.,* 177 NLRB 837 (1969).

in accordance with the Union's stated purpose.[16] Further, the 24 dollars' worth of fuel given to one employee and 7 dollars' worth to another are not shown to be grossly disproportionate to the amounts which could have been expended while the employees were utilizing their cars in accordance with the Union's purposes. It should also be noted that at least one of the two, Witness D, who received 24 dollars' worth of gas, accepted the free gas after he was made fully aware of the reason it was given. Moreover, even greater cash payments and gifts of higher value than the cost of the gas expended by the Union herein have been found by the Board not to have the tendency to influence the outcome of an election.[17]

Further, the facts in the instant case are analogous to those in *Jacqueline Cochran,*[18] wherein the Board adopted the regional Director's report which found that the union's action in giving a free turkey only to those employees attending its meeting held 25 days prior to the election, in order to encourage such attendance, did not destroy the necessary conditions for a free and fair election. Similarly, the Union's provision of free gas herein was made to encourage attendance at the union meetings and to spread the word of the union campaign, and was, in fact, announced as such. Further, the free gas incidents, similar to the gifts of the turkeys, were not timed to

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16. The fact that the union representative admitted to giving free gas to an employee in order for him and his brother to return to their homes after the second meeting does not constitute an admission by the representative that the free gas was simply a gift to the employees to influence their votes. The provision of gasoline in this circumstance did in fact fit within the Union's stated purpose of defraying the costs associated with attending the meetings, and thereby encouraging the employees to attend these gatherings.

17. See *Thrift Drug Co., supra; Commercial Letter, Inc., supra.*

18. 177 NLRB at 839.

be in close proximity to the polling date, thereby lessening their tendency to influence the election results.

Accordingly, on the basis of the discussion above, including Respondent's statement of position, and the entire record in the case, we conclude that the Union's action in purchasing gasoline for two eligible voters during its organizational campaign was not objectionable conduct and does not require setting aside the election herein. We, therefore, reaffirm the findings, conclusions, and remedy provided in the Board's Decision and Order of September 29, 1977.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms the Order heretofore entered in this proceeding on September 29, 1977, reported at 232 NLRB 601.

Dated, Washington, D.C. June 20, 1979

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
John A. Penello, Member

(Seal) National Labor Relations Board

APPENDIX E

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

GULF STATES CANNERS, INC., Respondent.

No. 79-3936

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

Jan. 12, 1981.

On remand from the Court of Appeals, 585 F.2d 757, the NLRB entered an order requiring employer to bargain collectively with the union. On application for enforcement of the order, the Court of Appeals held that evidence sustained NLRB's determination that union's offer to purchase gasoline for employees who transported other workers to the union meetings did not have such a tendency to influence the election that a new election would be required.

Enforcement granted.

* * *

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

We consider an application for enforcement of an order of the National Labor Relations Board which requires the respondent, Gulf States Canners, Inc., to bargain collec-

tively with Local 891 of the International Brotherhood of Teamsters, the victor in a representation election held among production, maintenance and quality-control employees working for respondent at its facility in Clinton, Mississippi. Gulf States has refused to bargain as means of challenging the results of the election, which it argues was unfairly influenced through the purchase of gasoline for employees by union representatives.

This is the second application for enforcement in this matter; we denied enforcement of the first after holding that the board had incorrectly based its decision on a consideration of whether the union, in purchasing the gasoline, had intended to influence the outcome of the election. The cause was remanded so that the board could apply a legal standard based upon effect rather than intent: "... the assay should seek to find whether the questioned action by an election candidate had a tendency to influence the outcome of the voting." *N. L. R. B. v. Gulf States Canners, Inc.*, 585 F.2d 757, 759 (5 Cir. 1978). It was further noted:

> The tendency-to-influence test requires an examination of the challenged action in the light of all the relevant facts, including whether the size of the benefit bears a proper relationship to the actor's stated purpose in conferring it, the number of employees receiving the benefit, the views of the employees concerning the purposes of the payments, and the timing of the payments. *Id.*

The court stated that, as "the facts here are undisputed, and the application of the tendency to influence test presents strictly a question of law," no hearing would be necessary on remand.

The board has, on remand, complied with our instructions. Applying the tendency-to-influence test to the facts

previously ascertained,[1] it concluded in a supplemental order that "the union's action in purchasing the gasoline for two eligible voters during its organizational campaign was not objectionable conduct and does not require setting aside the election herein."

[1] In this election objection case, it is our duty to determine whether the board has acted within the "wide degree of discretion" entrusted to it by Congress in representation matters. *See N. L. R. B. v. A. J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed. 322 (1946). This court has noted that a decision by the board "warrants special respect," and that review is limited to "a determination of the reasonableness of the board's finding." *Contract Knitter, Inc. v. N. L. R. B.*, 545 F.2d 967 (5 Cir. 1977). The employer bears a heavy burden of rebutting the presumption that "ballots cast under the safeguards

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1. The relevant facts are summarized in the board's supplemental order of June 20, 1979, for which enforcement is sought:

> At the first union meeting, more than 1 month prior to the election, the union announced its offer to provide gasoline to employees who transported other workers to the union meetings and/or who campaigned on behalf of the union at their fellow employees' homes. After this meeting, one employee, designated as witness D in the regional director's report, requested gasoline from a union representative. According to witness D's account of this conversation, he asked, "Didn't you say you were buying gas?" to which the union representative replied, "No, I am not buying gas. I said if you knew of anyone who wanted to come to the meeting but didn't have a ride I would furnish the gas to get that person. Oh, do you want some gas?" Witness D at that point answered, "Yes," and the union representative said "Okay." The union representative then purchased approximately 12 dollars worth of gasoline for witness D. A week later, after the second union meeting, witness D approached the union representative and, as set forth in his affidavit, stated, "I need some gas," to which the union representative replied, "Okay, follow me." (At that time, the union representative again purchased approximately the same amount of gasoline for witness D). On this occasion, another employee, witness C, who had followed witness D and the union representative to the gas station, received approximately 7 dollars worth of fuel.

provided by board procedures reflect the desires of the participating employees."

[2, 3] We cannot hold that the board abused its discretion in finding that the conduct alleged did not have such a tendency to influence the election that a new election is required. A simple showing of misconduct alone is not sufficient to mandate that result; the employer must also show that the acts "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of an election." *N. L. R. B. v. Gulf States Canners, Inc.*, 585 F.2d at 759. *See also N. L. R. B. v. Sumter Plywood Corporation*, 535 F.2d 917, 920 (5 Cir. 1976); *N. L. R. B. v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5 Cir. 1969). The board was justified in holding that such an effect was not shown here.

ENFORCED.

APPENDIX F

(Filed March 4, 1981)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITS A & B
NO. 79-3936

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

GULF STATES CANNERS, INC.,
Respondent.

Petition for Review of Order of the National Labor Relations Board

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion January 12, 1981, 5 Cir., 198.., ... F.2d .....).

(March 4, 1981)

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

Entered for the Court;
/s/ Illegible